REPORTABLE

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **FAO (OS) NO. 38 OF 2007**

% **Date of Decision** : 16th March, 2007.

Smt. Renu Sharma & Anr. .... Appellants.
Through Mr. Lala Ram Gupta, Sr.Advocate with
Mr.Manish Vashisht, Advocate.

VERSUS

Titan Industries Ltd & Anr .... Respondents.
Through Mr. A.S.Chandhiok, Sr. Advocate with
Ms.Manmeet Arora, Advocates.

CORAM:
HON'BLE DR. JUSTICE MUKUNDAKAM SHARMA, CHIEF JUSTICE
HON'BLE MR.JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not ?

3. Whether the judgment should be reported in the Digest ?

SANJIV KHANNA, J :

1. The present Appeal has been filed by Smt. Renu Sharma, the

appellant, for setting aside Order dated 11th December, 2006 passed by the learned Single Judge dismissing her application under Order IX, Rule 7 of the Code of Civil Procedure, 1908 (hereinafter referred to as the Code, for short).

2. The appellant herein is the defendant in the Suit-CS(OS) No.898/2003. The said Suit has been filed by M/s.Titan Industries Ltd., the respondent, for recovery of goods and damages and in the alternative, a decree for recovery of Rs.1,60,05,742/-.

3. It is alleged in the Suit that the appellant herein being one of the franchisees/agents of the respondent had been dealing with the respondent since 2nd October, 1996.

4. The appellant could not be served by ordinary process and was served by publication in the newspaper 'The Statesman" and was proceeded ex-parte vide Order dated 23rd April, 2004. The appellant moved an application for setting aside of the ex-parte Order on 2nd June, 2006. The said application was registered as I.A. No. 7184/2006. By the impugned Order this application was dismissed by the learned Single Judge.

5. Learned Single Judge rejected the application of the appellant herein, filed under Order IX, Rule 7 of the Code, inter alia, holding that three attempts were made to serve notice upon the appellant herein by registered post as well as ordinary process but without success. Learned Single Judge relying upon the reports of the process server as well as the postal authorities, came to the conclusion that the appellant herein was avoiding service and accordingly had rightly directed substituted service through publication.

6. We have heard learned counsel for the parties who have drawn our attention to the reports of the process server and the postal authorities. During the course of hearing, learned senior counsel for the appellant had stated that he is ready and willing to pay costs of Rs.50,000/- to the respondent in case the Order directing ex-parte proceedings is set aside.

7. It may be relevant to state here that the above-mentioned Suit was filed on 29th March, 2003. Vide Order dated 24th April, 2003 notice was issued restraining the appellant herein, her agents

and nominees from alienating, transferring, creating a mortgage, etc. the properties mentioned in the Schedule attached to the application for stay and the goods mentioned in Annexure-A to the plaint. Order-sheet shows that the defendant-appellant herein could not be served for the next date i.e. 11th July, 2003 and accordingly fresh notices were directed to be issued for 10th September, 2003. On 10th September, 2003, as per service reports, the appellant was out of India and therefore the Court directed issue of fresh summons for 25th November, 2003.

8. The respondent-plaintiff had filed an application under Order V, Rule 20 of the Code for substituted service by publication but the Court vide Order dated 10th September, 2003 rejected the said request. However, the said prayer was allowed by the next Order dated 25th November, 2003 with a direction that the appellant be served by substituted means by publication in the newspaper "The Statesman" for 10th March, 2004. Thereafter, on the basis of publication, vide Order dated 23rd April, 2004, the defendant-appellant herein was proceeded ex-parte.

9. The reports of the process server and the postal authorities indicate that on each occasion, neither the process server nor the post man was able to meet the appellant personally and tender summons to her.

10. The reports of the postman show that service on the two addresses at Patparganj and Hauz Khas village could not be served as no such person/firm was found. Summons could not be personally served on the appellant at 9B, Telegraphic Lane, New Delhi and the postman recorded that intimations were issued and thereafter the envelopes containing the summons were returned back as 'unclaimed'. The postman has not recorded the name and details of the persons on whom intimations were issued.

11. As far as the reports of the process server who had undertaken the service of summons are concerned, the process server did not meet and tender the summons personally on the appellant. As per the report dated 7th July, 2003, the premises at Patparganj was found to be in occupation of M/s.Rajwarah

International Pvt. Ltd. and one person, Mr. Chawla refused to accept the summon after stating that he had spoken to Mr. Sharma who had told him not to receive the court papers and had informed that Ms. Renu Sharma, i.e. the appellant was not available as she was in U.S.A. However, the report of the process server is not signed by Mr. Chawla but by an employee Mr.Asif. Signatures of Mr. Asif are also available on the process server's reports when he allegedly tried to serve summons on the appellant herein at 9B, Telegraphic Lane, New Delhi on 16th August, 2003 and 20th August, 2003. It is also stated in these reports that Mr.Asif or Mr.Sayed Asif Ali is an employee in the plaintiff company, i.e. the respondent herein. As per another report of the process server, on 16th August, 2003, the guard on duty who refused to give his name informed him that Ms.Renu Sharma had gone out of Delhi. As per the process server's report, on 20th August, 2003, the guard who identified himself as Santosh verbally informed the process server that Ms.Renu Sharma had gone out and he shall enquire from Mr.J.K.Sharma.

Mr. Santosh allegedly talked to Mr. J.K.Sharma on telephone and the guard thereafter refused to accept the summon stating, inter alia, that Mr. J.K.Sharma had informed him that Ms.Renu Sharma had gone to USA and he would not accept the summon. It may be relevant to state here that the process server did not speak to Mr.J.K.Sharma personally and the process server did not take signature of the guard-Mr. Santosh on the report. Similarly, in the report of the process server dated 16th November, 2003 it is stated that he along with an employee of the plaintiff, Mr.Sayed Asif Ali, had gone to 9B, Telegraphic Lane, New Delhi and the guard verbally informed them that "Madam was present inside". The guard asked them about the purpose of the visit and went inside. Thereafter, a domestic servant came out and informed the process server that Ms.Renu Sharma was not at home. Thereupon, the process server pasted a copy of the summon on the outer wall of the premises in the presence of Mr.Sayed Asif Ali. The other reports are of similar nature.

12. A perusal of the above reports show that attempts, both by

registered post as well as by ordinary process were made, to serve the appellant herein. However, on none of the occasions the process server or the postal authorities were able to meet the appellant or any adult male member of the family. Most of the times the interaction was with the guards and on one occasion with a person who was in occupation of the premises at Patparganj. It may be relevant to state here that the learned Single Judge while hearing the matter on 10th September, 2003 after perusing the reports felt that a case for passing an Order for substituted service had not been made out. It was specifically recorded by the learned Single Judge that as per the reports, the defendant-appellant herein was out of India and therefore fresh summons were directed to be issued.

13. It may be relevant to state here that in May 2004, meeting had taken place between the appellant and the respondent in the office of the learned counsel for the respondent-company. Mr. Mukesh Kalia, advocate had also participated in this meeting along with the appellant. Mr. Mukesh Kalia, advocate has filed an

affidavit stating that in the meeting, discussion took place for settlement of accounts but the said meeting did not fructify. In his affidavit dated 21st August, 2006 Mr. Mukesh Kalia, advocate has stated that the respondent-company or their advocate did not disclose in his presence that they had filed any suit against the appellant. It is difficult to verify the said statement except by oral evidence and cross-examination. However, it is difficult to believe that the appellant would have engaged a lawyer and would have gone to the office of the learned counsel for the respondent-company but did not deem it appropriate to appear in the Court. In normal course the appellant would have filed an application for setting aside of the ex-parte Order rather than wait for a further period of two years and then move an application.

14. Provisions of Order V of the Code relates to service of summons. Order V, Rule 12 of the Code enjoins that wherever it is practicable, service should be made on the person concerned unless the person has an agent empowered to accept service. Thus the requirement under law is that attempt should be made

to serve notice personally on the party unless there is an agent empowered to accept service. Order V, Rules 13 and 14 of the Code relate to service of summons on an agent in certain circumstances. The said Rules, however, are not applicable to the present case. Order V, Rule 15 of the Code empowers the process server to serve summons on any adult male member of the family, if the party is found to be absent when service of summons is sought to be effected on him at his residence and there is no likelihood of the party being found at the residence within reasonable time and he has no agent empowered to accept service. Explanation to the said Rules clarifies that a servant is not regarded as a member of the family within the meaning of Order V, Rule 15 of the Code. However, while effecting service under Order V, Rule 15 of the Code, process server has to record a specific finding that the party is absent from his residence and there is no likelihood of the party being found at the residence within reasonable time. The service can be effected only on an adult member of the family of the party.

Process server has therefore, to take care and caution on noting down the name and details of the adult member of the family.

15. It may also be relevant to state here that in none of the reports of the process server, the time when the process server had gone to serve the summon has been mentioned. Further, it appears that on all the occasions the process server who had gone to serve summons at the three addresses was the same person. It is rather unusual that on all the three occasions the administrative agency had appointed the same process server to serve the summon.

16. Order V, Rule 16 of the Code requires that a person on whom copy of the summons has been tendered or delivered shall affix his signatures on the copy. In the present case, the persons to whom the summons were allegedly delivered/tendered have not signed any endorsement on the copy.

17. Order V, Rule 17 of the Code stipulates that where a party or his agent or any adult member of the family refuses to sign/acknowledge or where the process server after using all due

and reasonable diligence is unable to find the party as he is absent and there is no likelihood of the party being found at the residence within reasonable time, the process server shall affix a copy of the summon on the outer door or some other conspicuous part of the house where the party ordinarily resides or carries on business or works. The process server thereafter is required to file a report containing necessary details and circumstances necessitating service by affixation.

18. Order V, Rule 19 of the Code requires that where summons has returned under Rule 17 without affidavit of the process server, the process server shall be examined on oath by the Court and on such further enquiry the Court can declare that the summon has been duly served. Where a process server has furnished an affidavit, the Court still has power to examine the process server and conduct such enquiry and thereafter decide whether the summon is duly served. Order V, Rule 19A of the Code stands omitted pursuant to Code of Civil Procedure (Amendment) Act, 1999 w.e.f. 1st July, 2002 but the said provision now stand

incorporated in Order V, Rule 17 of the Code.

19. We are conscious of the fact that parties do delay service of summons to stall and prolong proceedings. In fact there are circumstances which raise suspicion and indicate that the appellant herein was delaying service of summons. It is admitted by the appellant from her application that the three addresses on which attempts were being made to serve notices are correct. Attempt to serve notices was not made once but on three occasions both by ordinary process as well as by registered A.D. cover. Similarly, on publication, notices were sent by UPC by "The Statesman", a third party. There is also compliance of Order XXXIX, Rule 3A of the Code by the respondent. The appellant it is stated is wife of a senior police officer and was deliberately delaying and avoiding service of summons.

20. However, any judicial decision, where adequate opportunity is not given to a party to present his version of the case, can result in injustice. The Courts have to strike a delicate and difficult balance between both the parties. It is difficult to prove and

establish the facts, allegations and counter allegations without going deeper into the matter and giving opportunity to the parties to examine witnesses and cross-examine them. Sometimes it can become difficult for the Court to decide the question of "sufficient cause" as required under the provisions of Order IX, Rules 7 and 13 of the Code without recording evidence, thus delaying the matter and prolonging the litigation. Weighing and balancing equities on both the sides and with a view to expedite the progress of the case and not to stall the same by asking the parties to lead evidence, we feel it would be appropriate to allow the present appeal and set aside the ex-parte order subject to payment of costs of Rs.50,000/- to the respondent. In taking this view we are also keeping in mind the principle of law that no person should be condemned unheard and just and fair opportunity should be granted. Normally, principles of natural justice require that proceedings should not be conducted in the absence of parties, unless there are compelling circumstances, costs can be imposed to award adequate compensation.

Supreme Court in the case of ***Rani Kusum versus Kanchan Devi and others*** reported in (2005) 6 SCC 705, while examining the provisions of Order VIII, Rule 1 of the Code has observed that processural law has the object of advancing cause of justice. In adversarial system, a party should be given adequate opportunity to participate in the proceedings and processural law should not be construed in a manner so as to leave the party helpless. Processural law has to do substantial justice and is always subservient to and is an aid of justice. It should not be construed in a manner to obstruct a party from pleading it's case and representing himself. Keeping these principles in mind we feel that substantial justice will be done in case we allow the appellant to appear in the matter subject to payment of costs as aforesaid. This we feel will do substantial justice. We may mention here that the appellant is already appearing in the suit and the case has been fixed now for cross-examination of the witnesses of the appellant who have filed affidavit by way of evidence. We also find that after the appellant was proceeded

against ex-parte, the respondent had taken a long time to file affidavit by way of evidence of his witnesses. The matter was repeatedly adjourned at the request of the respondent herein.

21. We may, however, deal with the judgments relied upon by the respondent as the Appeal is being allowed subject to payment of costs. In the case of ***Emess Advertising Service versus The Hindustan Times*** reported in AIR 1998 Delhi 14, the Court was satisfied with the substituted service by way of publication in the newspaper. The Court also noticed that the notice was also sent by UPC by the said newspaper. In the case of ***Bhushan Tyagi versus Attar Kali*** reported in 67 (1997) DLT 496 the Court referred to the conduct of the defendant therein who had inspected the Court file but did not move any application for setting aside the ex-parte Order. The Court felt that the defendant therein was trying to over-reach the Court. In ***Rajesh Arora verssus Mukesh Jain & others*** reported in 93 (2001) DLT 328 the Court was dealing with the provisions of Order XXXVII, Rule 3 of the Code and in that context it was held that

sterner standards of service as laid down in Order V were not required to be complied with. Order XXXVII, Rule 3 of the Code relating to service of summons for judgment, requires summons to be left at the address furnished by the defendant. The said case has no application to the facts and circumstances of the present case. The last judgment relied upon by the respondent is in the case of ***Smt. Vitthalbhai.G. Ghodake versus United Western Bank limited and others*** reported in AIR 2003 Karnataka 266, wherein the Court observed that one of the defendant therein was duly served by registered post but the registered post letters sent to other defendants were returned back with the endorsement "not claimed". All the defendants were staying in the same address. The Court after examining the evidence came to the conclusion that the proceedings were within the knowledge of the defendants and they had deliberately by choice decided not to participate in the proceedings and therefore application under Order IX Rule 13 for setting aside the ex-parte Order was dismissed.

22. The Appeal is accordingly allowed and Order dated 11th December, 2006 dismissing IA 1784/2006 is set aside. Ex-parte order dated 23rd April, 2004 is also set aside subject to payment of costs of Rs.50,000/- by the appellant to the respondent. Costs will be paid within two weeks.

23. The appellant will file written statement within three weeks from today. Replication, if any, will be filed within three weeks thereafter. Parties will file documents/additional documents along with written statement/replication within the period stipulated therein. List before the Joint Registrar for admission/denial of documents on 10th May, 2007. The above time schedule shall be strictly adhered to by both the parties.

24. List the matter before the learned Single Judge for compliance and payment of costs, etc. on 17th April, 2007.

(SANJIV KHANNA)
JUDGE

(DR. MUKUNDAKAM SHARMA)

CHIEF JUSTICE

March 16, 2007.

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